84-715

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA AND
CHARLES A. GRADDICK,
ATTORNEY GENERAL, PETITIONERS

VS.

DARRYL PRUITT, RESPONDENT

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT
(PRIOR TO FINAL JUDGMENT)

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONER

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STATEMENT OF ISSUES PRESENTED

1. Should this Honorable Court grant certiorari prior to final judgment in the Court of Appeals to review a decision by a United States District Court declaring an important state statute unconstitutional, where said decision is on appeal to the Court of Appeals and where:

A. This Honorable Court has granted review of a similar ruling from another circuit,

B. There is a great public interest in the case, because the state statute defines the limits of the force which is justified, to the extent that it is necessary, in making a lawful arrest, and the statute's invalidation creates great confusion, in officers and citizens alike as to what force may be justified in making a felony arrest,

C. There is a need for prompt action to clear up confusion in a fundamental aspect of the administration of criminal justice and,

D. There are no factual disputes relating to the constitutionality of the statute?

2. To what extent, if any, does the United States Constitution underwrite illegal resistance to lawful felony arrest?

3. Does the U.S. Constitution authorize a state to establish a legal defense based on established common law principles, in the interest of discouraging resistance to arrest, protecting human life and guaranteeing that the law is not impotent in dealing with lawlessness?

4. Is a state statute which creates a defense to claims and charges arising out of the use of force by police

officers, to the extent that such force is necessary to effect lawful felony arrests, repugnant to the U. S. Constitution?

THE PARTIES

In the District Court, the parties were Darryl Pruitt, Plaintiff, who is Respondent herein, and the City of Montgomery, Alabama, and Lester G. Kidd, Defendants, who are not parties herein. In the United States Court of Appeals for the Eleventh Circuit, the parties are the City of Montgomery, Alabama, and Lester G. Kidd, Appellants, Darryl Pruitt, Appellee, and the State of Alabama and Charles A. Graddick, Attorney General, interveners under 28 U.S.C. 2403, who are Petitioners herein.

The matters at issue here were raised by the Respondent in the District Court and have been at issue throughout this litigation.

TABLE OF CONTENTS

TABLE OF CONTENTS CONT'D

TABLE OF CONSTITUTIONAL PROVISIONS

TABLE OF CASES

TABLE OF CASES CONT'D

TABLE OF CASES CONT'D

TABLE OF CASES CONT'D

TABLE OF CASES CONT'D

TABLE OF STATUTES

TABLE OF STATUTES CONT'D

TABLE OF RULES OF COURT

TABLE OF OTHER AUTHORITY CITED

OPINIONS AND ORDERS BELOW

The order and opinion of the United States District Court for the Middle District of Alabama, declaring Section 13A-3-27, Code of Alabama, 1975, unconstitutional, are not reported. A copy of the same is submitted as Appendix "A" to this petition.

The order of the United States Court of Appeals allowing your Petitioners to intervene under 28 United States Code, Section 2403 submitted as Appendix "D" to this Petition.

JURISDICTION

This cause is now pending in the United States Court of Appeals for the Eleventh Circuit.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States District Court for the Middle District of Alabama decided this case under Ayler v. Hopper (532 F.Supp. 198 [M.D.Ala., 1981]) wherein the same District Court and Judge had ruled as dicta that Section 13A-3-27, Code of Alabama, 1975, is unconstitutional, apparently under section one of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection to the laws..."

STATUTORY PROVISIONS INVOLVED

The sole issue in this case is the constitutionality of Section 13A-3-27, Code of Alabama, 1975. The same is submitted as Appendix "B" to this Petition.

STATEMENT OF THE CASE

After the June 12, 1984, decision of the District Court declaring the statute unconstitutional, the Defendants attempted to take an interlocutory appeal. This attempt failed because the District Court took no action at all on it. Thus, this case did not get to the Court of Appeals until September 5, 1984. The record still has not been filed. Therefore, this statement cannot refer to the record.

The Petitioners have no interest in this litigation save in the constitutionality, vel non, of Section 13A-3-27, Code of Alabama, 1975. The Petitioners are neither authorized to argue nor do they argue any other issue in the Court of Appeals or here. This statement of the case is, therefore, limited to the rulings relating to the statute.

The history of this case goes back to Ayler v. Hopper (532 F.Supp. 198 [M.D.Ala., 1981]). In that case a convict sued a prison official under 42 U.S.C. 1983. The official had seen the convict escaping and, having no other means of stopping the convict, shot at him and wounded him. The plaintiff convict claimed damages for his injuries.

The defendant prison official raised the defense of good faith reliance on Section 13A-3-27, and the plaintiff asked the District Court for a ruling on the constitutionality of the statute. The Court ruled that, whether the statute was constitutional or not, the prison official had relied on it in good faith and had the right to his defense. Ayler v. Hopper, 532 F.Supp. 198, 199-200 (M.D. Ala. 1981). The Court then wrote:

> "...Presumably the plaintiff is familiar with the above and actually seeks by his first motion in limine an indication of what the Court understands to be the constitutional standards governing the plaintiff's section 1983 claim and the defendant's asserted good faith immunity defense. Because these standards have been the subject of extensive briefs by the parties, and because pretrial knowledge of the Court's

> understanding of these standards is likely to be crucial to the effective prosecution and defense of this case and in general to its orderly disposition, the Court finds it appropriate and desirable to inform the parties at this time of its understanding of these standards...." (532 F.Supp. 198, 200)

There then followed an advisory opinion declaring Section 13A-3-27 unconstitutional. The Court held that officers were barred from using deadly force to overcome resistance to any arrest. Such force, the Court opined, could only be used to prevent <u>imminent</u> death or great bodily harm. The Court wrote:

> "...It is clear to the Court that the use of deadly force by a prison official to stop an escaping felon is consitutionally tortious unless the official has good reason to believe that the use of force is necessary to prevent imminent, or at least a substantial

> likelihood of, death or great bodily harm...." (532 F.Supp. 198, 201)

Since the defendant prison official prevailed on both his right to raise the statute as a defense and in the final judgment and the plaintiff convict did not appeal, there was no occasion for appellate review of Ayler. See Ashcroft v. Mattis, 431 U.S. 171, 52 L.Ed.2d 219, 97 S.Ct. 1739 (1977).

The instant case began as a near carbon copy of Ayler. An injured arrestee sued a police officer and the City of Montgomery under 42 U.S.C. 1983. The cause came before the same court and the same judge as Ayler. It seemed that if Section 13A-3-27 is valid, then the Defendants had a valid defense. If Ayler is correct then the defendants had violated the Constitution. On June 12,

1984, the District Court re-affirmed its decision in Ayler and, rely-ing on Ayler and Garner v. Memphis Police Department (710 F.2d 240 [6th Cir., 1983], now pending in this Court) ruled Section 13A-3-27, unconstitutional and granted summary judgment for the Plaintiff. (Appendix "A")

An attempt by the Defendants to appeal the June 12, 1984, order inter-locutorily failed when the District Court took no action on the Defendants' motion. After a final judgment for the Plaintiff, the Defendants appealed to the U.S. Court of Appeals for the Eleventh Circuit. The Appeal was docketed on September 5, 1984, and your Petitioners' motion to intervene was granted on October 9, 1984. (Appendicies "C" & "D")

The Appellee in the Court of Appeals (Respondent here) has moved to stay

proceedings in the appeal pending a decision by this Honorable Court in Garner v. Memphis Police Department, above. (Appendix "E")

STATEMENT OF THE FACTS

The issue in this case is the constitutionality vel non of state statute which codifies a common law rule. The facts of the case are relevant only in suggesting the context in which the statute operated. The District Court granted summary judgment on the basis of depositions. The most significant of these are briefly digested below.

FROM THE DEPOSITION OF DARRYL W. PRUITT:

The incident took place shortly before Pruitt's twentieth birthday. (pp. 4 & 6) Prior to the incident, Pruitt had amassed a minor criminal

record for third degree theft and traffic offenses. (pp. 9-11)

At one o'clock in the morning on the date of the incident, Pruitt, two male friends and two young ladies went to a closed auto parts store on West Fairview Avenue, in Montgomery Alabama. (pp. 11-12) One of the young ladies was fifteen year old Sharon Brown. (pp. 12 & 16) Pruitt took Miss Brown into a shed behind the parts store and had sexual intercourse with her.[1] (pp. 12-15 & 18) After Pruitt dressed and while he waited for Miss Brown to dress, the two other

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1. "§13A-6-62. Rape in the second degree.

"(a) A male commits the crime of rape in the second degree if:
"(1) Being 16 years old or older, he engages in sexual intercourse with a female less than 16 and more than 12 years old; provided, however, the actor is at least two years older than the female...." (Code of Alabama, 1975)

men broke and ran from the scene. (R.p.19) Pruitt heard two commands from officer Kidd to halt, but he did not believe that the person was an officer. He continued moving away "...walking...at maximum speed....". (p. 22-23) The first shot "...sprinkled ...[his] arm and back...." (p.20) The second shot struck him in the lower back. (ibid) He was three or four yards from a ditch, but his momentum carried him into the ditch. (pp. 23-24) Pruitt described the officer who shot him as "...a black guy...." (p.22)

Th incident was investigated by the Montgomery County District Attorney's office. (p.32)

Pruitt was charged with rape in the second degree. The case was no billed by the grand jury, but Pruitt does not know why. (p.32)

FROM THE DEPOSITION OF
OFFICER LESTER G. C. KIDD:

Officer Kidd testified that he understood, based on his training, that (1) where an officer was absolutely certain that a person has committed a felony and cannot otherwise be stopped, the officer has discretion to shoot and that (2) that discretion is be exercised to protect human life. (p.11-14)

On the night of the incident, he and his partner received a radio call that there was a burglary in process at 614 West Fairview Avenue. They proceeded to the scene, and Kidd was dropped off in the wooded area behind the store. (pp. 15-16) Kidd went into the dark thicket. He received word from his partner that he, the partner, had two suspects in custody, and that the original report had come from an adjacent store and had

stated that three black males had been breaking into the parts store. (pp. 16-18) As Kidd moved on into the thicket, Pruitt jumped out from behind a bush and charged the officer. When Kidd brought his shot gun to high port in order to repel the attack, Pruitt veered off and fled toward a ditch. (p.18) What happened next takes more time to describe than it did to occur. Kidd called out, "Halt, police!" at least twice. (pp. 19-20,25,30-31,34) Officer Kidd tried to pursue Pruitt, but the conditions of the thicket prevented it. (pp. 39-40) There was not enough time nor light to determine if Pruitt had anything in his hands. (pp. 16,32,34 & 38) Kidd judged that if he did succeed in overtaking the suspect, a fight would insue, in which the officer would be disadvantaged by

his encumbering equipment, would risk losing his weapons and having them turned on himself. (p. 39-40) After calling at least twice for the running suspect to stop, Kidd fired and, when the suspect continued to run, fired again. (p. 20) In each case he aimed for the suspect's legs. (ibid)

Pellets from the second shot struck Pruitt in the buttocks. (p. 45)

Kidd later found out that the crime was rape, not burglary. (p. 46)

On the question of whether he considered Pruitt dangerous, Officer Kidd testified:

> "Q. Now, at the time that you fired the shots, did you think that Pruitt was dangerous?
>
> "A. When the subject came at me, that let me know right then that the subject would use physical force if necessary, so as far as my thinking he's

dangerous. Anytime a subject would even attempt to use physical force the subject has a potential of being dangerous because I have two weapons on me. So if I were to be knocked down and he were to take my shotgun then I'm through with.

"Q. Any other -- did you have any other reasons for believing he was dangerous at the time?

"A. None other than being a felon coming out of a building, just those two reasons, the strongest one being him coming at me..." (p. 40)

* * * *

"Q. So is it correct then that the time you shot Darryl Pruitt you didn't think he was about to kill or harm some other person?

"A. No. At the time that I shot Darryl Pruitt my thinking was that he was a fleeing felon coming from a burglary; that he also had made an attempt to physically harm a police officer but he avoided that attempt and he was a subject that I felt needed to be stopped...." (p. 84)

SUMMARY OF THE ARGUMENT

I. This Honorable Court has jurisdiction to issue certiorari to a Court of Appeals before final judgment in said Court. 28 U.S.C. 1254(1) The Court should exercise this extraordinary power in this case because: (1) The primary issue in the Court of Appeals and the only issue raised by Petitioners is the same issue in Garner v. Memphis Police Department (710 F.2d 240 [6th Cir., 1983]), now pending in this Court. Case Nos. 83-1070 and 83-1035, ___ U.S. ___, ___ L.Ed.2d ___, 104 S.Ct. 1589, 52 U.S. L.Wk 3687 (1984). Compare Taylor v. McElroy, 360 U.S. 709, 710, 3 L.Ed.2d 1528, 1529, 79 S.Ct. 1428 (1959); (2) This case is of imperative public importance, since at issue is Alabama's ability to protect its citizens and

enforce the law at the most fundamental level. Rule 18, Rules of the Supreme Court; Wilson v. Girard, 354 U.S. 524, 1 L.Ed.2d 1544, 77 S.Ct. 1409 (1957); (3) There are no issues of fact in this case. Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330, 344, 79 L.Ed.2d 1468, 1473, 55 S.Ct. 758 (1935); (4) The need for a prompt resolution of the matters at issue here is obvious, but the Court of Appeals might be well advised to grant the Respondent's motion and delay decision until this Honorable Court acts in Garner v. Memphis Police Department, above.

II. The basic issue in this case is: when is it reasonable for an officer to use firearms to effect an arrest? The common law, codified in Section 13A-3-27, Code of Alabama, 1975, draws the line at

felony-misdemeanor. The Courts which have rejected the common law rule have adopted a wide spectrum of alternative lines. The most restrictive being that adopted by the District Court in this case, which declares deadly force as always unreasonable to merely overcome resistance to arrest. (See Appendix "A")

IT IS THE FATE OF THE COMMON LAW RULE THAT IT ALWAYS COMES BEFORE THE COURTS IN WORST CASE SENARIOS. Thus, this rule which seeks to balance rights and protection between officers and arrestees is always tested in cases wherein natural sympathy tends to rest with a resisting arrestee. The attempts to charactarize the common law rule as placing resisting arrestees beyond the protection of the law and as inflicting punishment are false. The rule creates a defense and, if it authorizes anything,

it does so in the same sence that the defense of entrapment authorizes the crimes which it excuses. Like all defenses, that created by the common law rule is based on sound policy considerations. In the case of the common law rule, these include: (1) The protection of human life and limb of officers and citizens, including arrestees, by discouraging resistance, extending to officers a full measure of self defense, providing officers who must use force in making arrests with clear and practical guidance in confusing, life threatening, emergency situations, and permitting officers, who must deal on an emergency basis with volatile and unpredictable life threatening situations, with sufficient discretion, and (2) Preventing the law from underwriting the lawlessness of resistance to arrest.

A. This Honorable Court has never addressed the constitutionality of the common law rule nor the Alabama statute, and ought to do so in this case.

B. While the courts which have condemned the common law rule have proposed a wide variety of alternatives, all agree that the actions of police officers are to be judged by hindsight. This Honorable Court has condemned the use of hindsight in after-the-fact review of the decisions of warrant magistrates (Illinois v. Gates, ___ U.S. ___, 76 L.Ed.2d 527, 546-547, 103 S.Ct. ___ [1983]; Massachusetts v. Upton, ___ U.S. ___, 80 L.Ed.2d 721, 727, 104 S.Ct. ___ [1984]) and defense attorneys (Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674, 694-695, 104 S.Ct. ___ [1984]). If hindsight is inappropriate in reviewing the actions of those who need not act in

emergency situations, how is it appropriate in judging the actions of those who must do so?

C. Athough two U.S. Circuits have condemned the common law rule, two Circuits and three state supreme courts have recently upheld the constitutionality of the rule.

ARGUMENT

I.

REASONS FOR GRANTING THE WRIT PRIOR JUDGEMENT IN COURT OF APPEALS

Although this Honorable Court clearly has jurisdiction to issue certiorari to a Court of Appeals "...before...rendition of judgment or decree...." (28 U.S.C. 1254[1]), this is an extraordinary departure from normal procedure and will be permitted only in extraordinary circumstances. This

Honorable Court has by rule and decision identified these circumstances. The instant case meets all of these criteria.

The primary issue in the Court of Appeals and the only issue which the Petitioner State and its Attorney General are authorized to argue there, is the constitutionality of Section 13A-3-27, Code of Alabama, 1975. In Garner v. Memphis Police Department (710 F.2d 240 [6th Cir., 1983]) the Sixth Circuit found a Tennessee statute similar to Section 13A-3-27, above, unconstitutional. In invalidating Section 13A-3-27 in the instant case, the District Court cited and relied on Garner. Appendix "A", page 8. As the District Court noted, this Honorable Court is now reviewing Garner on both appeal and certiorari. Tennessee v. Garner, No. 83-1035, and Memphis Police Department v.

Garner, No. 83-1070, ___ U.S. ___, ___ L.Ed.2d ___, 104 S.Ct. 1589, 52 U.S. L.Wk. 3687 (1984). The pendency of a case involving an identical issue is grounds for granting the writ prior to judgment in the Court of Appeals. Taylor v. McElroy, 360 U.S. 709, 710, 3 L.Ed.2d 1528, 1529, 79 S.Ct. 1428 (1959). However, here the pending case not only involves the same issue but provided a basis for the judgment in the instant case. For this reason, the writ should issue now.

The need for a rule of law governing the use of force in overcoming resistance to lawful arrest is obvious. For centuries this office has been served by a common law rule. See 6A C.J.S. Arrest, Section 49(b); 5 AM. Jur. 2d, Arrest, Section 84; 83 A.L.R. 3d 157-230. Section 13A-3-27, Code of

Alabama, 1975, is a codification of this common law rule. In striking down this statute, the District Court rejected an ancient and successful rule of law. The District Court's action leaves Alabama officers with no practical rule to guide them in the use of force. Because of the District Court's ruling the State of Alabama's ability to protect the public, especially in high crime areas, is severely limited. This untenable situation will remain until a practical rule is established by this Honorable Court. For these reasons this case is of imperative public importance. Rule 18, Rules of the Supreme Court; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 584, 96 L.Ed. 1153, 1166, 72 S.Ct. 863,

26 A.L.R. 2d 1378 (1952); Norman v. B & O R.R. Co., 294 U.S. 240, 79 L.Ed. 885, 55 S.Ct. 407, 95 A.L.R. 1352 (1935); Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330, 344, 79 L.Ed. 1468, 1473, 55 S.Ct. 758 (1935). This is especially so since the matter at issue here affects at the most basic practical level the ability of the State of Alabama to administer the criminal laws. Compare Wilson v. Girard, 354 U.S. 524, 1 L.Ed.2d 1544, 77 S.Ct. 1409 (1957) and United States v. Nixon, 418 U.S. 683, 686-687, 41 L.Ed.2d 1039, 1051-1052, 94 S.Ct. 3090 (1974).

Since the District Court declared the statute unconstitutional on its face by summary judgment, there are no issues of fact in this case. See Railroad Retirement Board v. Alton R.R. Co., 295

U.S. 330, 344, 79 L.Ed. 1468, 1473, 55 S.Ct. 758 (1935).

The need for a prompt decision either upholding the statute or providing Alabama officers with another practical rule to guide them in the use of force in making arrests is obvious. Yet, the Court of Appeals, given the importance of the validity of the statute to the District Court's decision, would no doubt be well advised to grant the Respondent's motion (Appendix E) and stay proceedings in this case until this Honorable Court acts in Tennessee v. Garner, above.

There are, as already outlined, many valid reasons for this Honorable Court to consider the constitutionality of Section 13A-3-27, Code of Alabama, 1975, now, perhaps in conjunction with Garner, and there are no reasons for waiting.

Therefore, the writ ought to be granted now.

II.

REASONS FOR GRANTING THE WRIT GENERALLY

INTRODUCTION: Section 13A-3-27, WHAT IT IS, WHAT IT IS NOT AND CRITICISMS OF IT.

Section 13A-3-27, Code of Alabama, 1975, is the Alabama codification of the common law rule limiting the use of force in overcoming resistance to lawful arrest. See 6A C.J.S., Arrest, Section 49(b); 5 Am. Jur. 2d, Arrest, Section 84 and 83 A.L.R. 3rd 157-230. The common law rule may be succinctly stated:

An officer is justified in using whatever force is (1) necessary in overcoming resistance to a lawful arrest, provided (2) such force is reasonable.

There is absolutely no controversy over this rule. The controversy swirls

around the definition of "reasonable." The common law rule, in an effort to establish a standard which is sufficiently certain to be of practical use in highly uncertain situations, defines "reasonable" in terms of the legal definition of the involved crime: Any force short of deadly force is "reasonable" in the case of a misdemeanor arrest; any force, including deadly force, is "reasonable" in the case of a felony arrest. The various critics of the common law rule have proposed almost as many alternative definitions for "reasonable" as there are proponents. The spectrum of these definitions ranges from the suggestion that deadly force may not be reasonable to overcome resistance to arrests for tax evasion, antitrust

violation, etc.[2]. (Judge McCree concurring in Beech v. Melancon, 465 F.2d 425, 426-427 [6th Cir., 1972], cert. denied 409 U.S. 1114, 34 L.Ed.2d 696, 93 S.Ct. 927) to the position taken by the District Court in the instant case. That position is: Deadly force is never "reasonable" in overcoming resistance to arrest; such force is permissible only for the purpose of guarding against immanent threats to life of limb. (Appendix "A")

Another definition, although one about which there is no controversy, is that of "deadly force." "Deadly force"

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2. Such arrests are seldom made under the emergency situations which are the rule's usual field of operation. Since the officers can usually choose the time, place and manner of such arrests, they can minimize resistance and, ipso facto, minimize the force necessary to overcome resistance.

is identified almost entirely, if not entirely, with the discharge of firearms. High speed automobile chases, blows to the head and other activities which can and sometimes do cause death, are not generally considered "deadly force", unless a death actually results. Thus, in the instant case even though the officer did not intend to kill, did not shoot to kill and did not kill, the District Court rejected the suggestion that he did not use deadly force, since he discharged a firearm. However, the striking of a resisting traffic law offender in the head with a flashlight is not considered use of deadly force, even where the resulting injuries are far more serious than those caused by the firearm in the instant case. See Wellington v. Daniels, 717 F.2d 932 (4th Cir., 1983).

It is the fate of the common law rule and the statutes based on it that they never come before the courts, except in "worst case senarios." And, it is on the basis of these worst case senarios that the rule is always attacked. Everyday in Alabama and throughout the Nation thousands of felony arrests are made with no more force than the spoken word. The submission of these felony arrestees is always effected, at least in part, by the knowledge that resistance would be futile, since the officer would be justified in using whatever force is necessary in overcoming resistance. Yet, the cases that come before the courts arise invariably out of those unusual arrests where force is necessitated. In fact, the cases most commonly before the courts are those rarest of arrests where the use of deadly force was compelled.

No one would condemn a surgical procedure which is 99.9% successful on the basis of the occasional failures, without even a glance at the benefits of the numerous successful operations. Yet, this is the basis on which the common law rule is condemned. This is an important point. The common law rule seeks to balance rights and protection between the officer and the arrestee. The concern of those who condemn the common law rule centers almost entirely on the protection of the arrestee. One is reminded of Dr. Derek C. Bok's controversial observations of a year ago:

> "...[C]haracteristic of adjudication is the tendency to concentrate on the immediate case at hand while paying less heed to the effects on a wider public...." ("A Flawed System" by Derek C. Bok, Harvard Magazine, May-June, 1983, p. 38 at 42.)

The common law rule is often characterized as placing resisting arrestees beyond the protection of the law. Such a characterization ignores at least two thirds of the rule, which balances rights and protection between officers and arrestees. First, the arrest must be lawful. Second and of the greatest practical importance, absolutely no force is justified beyond that which is necessary to overcome resistance. See, for example, Clark v. Ziedonis, 513 F.2d 79, 83 (7th Cir., 1975). This limitation has two important effects: It limits the use of force by the officer to that which is necessary, and it places in the arrestee the practical power to decide how much force will be necessary and, therefore, justified.

The common law rule is often characterized as providing punishment for resisting arrest. This is false. Police officers who undertake to punish arrestees violate the Constitution, the criminal law and the civil law of both the State and the Nation. In arresting even an escaped death row inmate who has been convicted of mass murder, an officer is justified in using not one scintilla more force than is necessary. The fallacy of the characterization of this ancient rule as relating to punishment is demonstrated by the fact that the rule distinguishes only between felonies and misdemeanors and does not otherwise relate to punishment. Punishment is the business of judges not police officers.

The common law rule is often characterized as "authorizing" the use of

deadly force in stopping fleeing felons. This is a most unusual use of the word "authorize." The common law rule, as it is embodied in the invalidated Alabama statute, is a defense.[3] Does the defense of insanity authorize murder or rape by insane persons? Does entrapment authorize drug trafficking or prostitution by entrapped defendants? Does contributory negligence authorize negligence injury? Defenses represent policy decisions to hold defendants justified or excused for actions normally condemned. The basis of the defenses above mentioned and that codified in Section 13A-3-27, Code of Alabama, 1975,

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3. The defense compares closely with assumption of risk: One who undertakes to resist a lawful arrest assumes the risk of any injuries occasioned by the force necessary to overcome the resistance.

is sound policy considerations. There are at least two general sound policy considerations justifying the defense established by Section 13A-3-27: The protection of human life and the upholding of the law as a potent force against lawlessness.

1.

PROTECTION OF HUMAN LIFE

The common law rule protects human life by (1) discouraging resistance of arrest, (2) permitting officers a full measure of self protection in the event of resistance, and (3) giving officers sufficient discretion to deal with confusing and unpredictable life threatening situtaions.

Any resistance to arrest situation is highly dangerous to innocent bystanders, arrestees and officers. The initial

function of any rule governing force incident to arrest is not to define the officer's civil liability nor even guide the officer in overcoming resistance but to discourage resistance. Non-resistance to arrest is the safest course for society, innocent bystanders, officers and arrestees. For centuries the common law rule has discouraged resistance to the great mass of lawful arrests.

Where an arrestee, notwithstanding the rule, chooses to resist arrest, the inherent danger to the officer is universally recognized. Even Courts which have rejected the common law rule have recognized that officers may resort to deadly force to protect themselves from death or serious injury. However, these courts disregard the fact that an officer effecting an arrest is ipso facto

deprived of the two best protections anyone has: (1) avoiding potentially violent altercations and (2) leaving the scene when a violent altercation occurs. In fact, freedom from fault in bringing on the difficulty and retreat are elements of common self defense. 40 Am. Jur.2d Homocide, Section 140. An officer undertaking a lawful arrest is always "at fault" in bringing on the difficulty, and, if the arrest is resisted, the officer expected to go forward, not retreat. When an altercation between private citizens comes to a final termination, the law forbids one of the citizens to seek out the other and renew the combat. 40 C.J.S., Homocide, Section 133. However, when a resisting arrestee makes good his escape, an officer is under a duty to seek him out and effect

the arrest. The Courts which condemn the common law rule assume that a felon who is running away from an officer is no danger to the officer. Yet, the law of self defense has always recognized strategic withdrawal, as opposed to completely breaking off the combat. 40 C.J.S., Homocide, Section 132. This is especially relevant in the case of an arresting officer, who is expected to pursue. The Courts which reject the common law rule assume that an officer confronted with an unarmed resisting arrestee can safely engage in a phsical struggle. Gamble v. State (48 Ala. App. 605, 266 So.2d 817 [1972]) and Taylor v. State (48 Ala. App. 443, 265 So.2d 886 [1972]) are cases which arose out of just such struggles. In both cases the struggles cost the officers their guns, and in one (Gamble), the struggle with an

unarmed teenage drunk driver cost an officer his life. Although the courts which reject the common law rule seem to think that they are authorizing officers to fully protect themselves, these Courts are in fact leaving police officers with bearly half a loaf of the protection permitted private citizens. Our society sends its police officers into dangerous situations to defend our basic human rights and our way of life; we owe them more than a remnant of common self defense. The common law rule balances concern for the arrestee with concern for the officer.

The state has an interest in establishing a practical rule for guiding officers in the use of force in making arrests. The facts of the instant case present a prime example of the usual

situation where a rule governing the use of force in making an arrest comes into play: In a dark thicket a subject first charges the officer then flees. The officer can see only the subject's shirt and socks. (Kidd's deposition, p. 34) The officer has little information or time to analyze what he knows and no time at all to gather additional information. The officers have been dispatched to investigate a burglary but discover a rape. Any rule governing the use force in arrest must allow officers to proceed on what they know, not what they don't know. The rule must be clear and clearly understood. It must be drawn in terms which require a minimum of interpretation. The resisted arrest situation cannot be controlled by guessing games. Normally, there is not enough time to

make social judgments nor to apply philosophical principles. The risk that the arrestee, the officer and a later reviewing court will reach different conclusions about how much force is or was justified must be minimized if not eliminated. For centuries the common law rule has served this office well.

The strength of the common law rule is demonstrated by the very cases wherein it is condemned. The Eighth Circuit condemned the common law rule, but refused to establish anything in its place. Mathis v. Schnarr, 547 F.2d 1007, 1020 (8th Cir., 1976); vacated 431 U.S. 171, 52 L.Ed.2d 219, 97 S.Ct. 1739. The Sixth Circuit would allow an officer to use deadly force against a resisting arrestee who "...poses...a danger to the community if left at large...." (Garner v. Memphis Police Department, 710 F.2d

240, 246 [6th Cir., 1983], pend. on cert. and app.), but the District Court in the instant case would allow the use of such force only "...to prevent imminent, or at least a substantial likelihood of, death or great bodily harm...." Ayler v. Hopper, 532 F.Supp. 198, 201 (M.D.Ala., 1981); Appendix "A".[4] All of these rules require officers to act only on solid information in situations where information is scarce. All of the rules advanced in place of the common law rule are cast in terms which call on officers and arrestees to make judgments which

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4. The difference between these rules is of great practical importance. If the fleeing convicts in Ayler had been death row inmates, the rule of that case still would not have allowed the guard to fire, but the Sixth Circuit rule probably would allow him to do so. Of course, as a practical matter the guard probably would have no way of knowing exactly what the escapees' criminal history was.

they cannot make and to make them at the risk of their lives and civil and criminal liability. In rejecting the common law rule, the District Court and the other lower courts have discarded a rule which has worked well for centuries. In its place they propose rules which are utterly irrelevant to the actual resisted arrest situation. If the common law rule is rejected, it will take years to establish a suitable substitute. During those years, how many arrestees, officers and innocent people will suffer injury or death because someone made the wrong guess.

From what has already been said, it is, obvious that any rule governing the use of force in making arrests must provide arresting officers with enough discretion to deal with highly volatile and unpredictable life-threatening

situations. An officer who undertakes to make a lawful arrest is in the paradoxical position of confronting a citizen in an effort to take away his freedom, while at the same time minimizing the danger to innocent bystanders, the officer himself and the arrestee. There is no way that the law can anticipate all of the conditions of lighting, weather, and terrain under which such confrontations will take place. Arrestees, like all humans, are unpredictable, but arrestees, especially those who resist arrest, are highly likely to be under the influence of alcohol or other drugs or in a state of rage or panic, rendering them all the more unpredictable. An officer attempting to deal with such situations obviously must have broad discretion.

2.

UPHOLDING THE LAW AS A POTENT FORCE AGAINST LAWLESSNESS

Resisting a lawful arrest is an unlawful act, and it creates a lawless situation. The question in this case is: Can the law deal with it? The common law rule says: "Yes." The rule adopted by the District Court in this case says: "No, if deadly force is necessary." The various other rules proposed in the place of the common law rule say: "Sometimes."

The courts which have struck down the common law rule on constitutional grounds hold by necessary implication that the U.S. Constitution extends its protection to certain forms of lawlessness. The constitution cannot underwrite lawlessness.

The rules of these cases will necessarily encourage flight and other forms of resistance to arrest. Arrestees who obey the law and surrender will be punished for their crimes, while those who successfully resist arrest will have as a practical matter an absolute defense. The State has an interest in preventing such absurd results. We all have a vital interest in the potency of the law.

SUMMATION

The real issue in this case is: Does the U.S. Constitution permit the states to maintain a rule of law governing the use of force in overcoming resistance to lawful arrest which (1) discourages rather than encourages resistance to arrest, (2) extends the

fullest possible measure of protection to innocent citizens, officers and arrestees, rather than just to arrestees and (3) underwrites lawfulness rather than lawlessness?

The controversy over the common law rule is primarily a matter of practicality versus philosophy. The common law rule has worked well in practice for centuries. The critics of the common law rule apparently seek in the place of the anicent practical rule a rule that is philosophically pure, whether it works or not.

A.

NOVEL QUESTION

This Honorable Court has never ruled on the constitutionality of the common law rule nor on the validity of the Alabama statute. The need for relief from the present confusion is obvious. This Court should issue the writ and address these matters now.

B.

CONFLICT WITH THE PRIOR DECISIONS OF THIS HONORABLE COURT ON HINDSIGHT JUDGMENTS

As already observed, the courts which have condemned the common law rule have advanced various conflicting rules in its place. However, one thing all of these court agree about is that the officer's actions are to be judged, not on the basis of what the officer knew or judged at the time of the event but on

the basis of what is known to and judged by the court on after-the-fact review.

The instant case falls into this pattern. There was no dispute as to the fact that, based on a citizen's report, officers were dispatched to investigate a burglary. However, the crime turned out to be rape not burglary. The District Court held officer Kidd liable on the basis of the finding: "...There was no burlgary as suspected...." (Appendix "A", p. 3) At the time of the arrest, Officer Kidd could see only the Respondent's shirt and socks (Kidd's deposition, p. 34), but the officer was held liable for shooting at an unarmed man.

While this Honorable Court has never addressed the common law rule governing the use of force in making an arrest, the Court has condemned hindsight judgments

of warrant magistrates and defense attorneys. Search warrants are not to be subjected to de novo review. Illinois v. Gates, ___ U.S. ___, 76 L.Ed.2d 527, 546-547, 103 S.Ct. ___ (1983); Massachusetts v. Upton, ___ U.S. ___, 80 L.Ed.2d 721, 727, 104 S.Ct. ___ (1984). In Strickland v. Washington (___ U.S. ___, 80 L.Ed.2d 674, 104 S.Ct. ___ [1984]) this court rejected hindsight judgments of the acts and omissions of defense attorneys. The Court wrote in pertinent part:

> "...It is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable...
>
> "...[A] court deciding an actual ineffectiveness claim must judge the reasonableness

> of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct...." (80 L.Ed.2d 674, 694-695; emphasis supplied)

The rules of these cases are as reasonable as hindsight judgments are unreasonable. But, warrant magistrates and defense attorneys do not act in the dark nor on unfamiliar terrain as police officers commonly do. A judge, who is unsure how to act, can take the matter under advisement; a lawyer whose case takes an unexpected turn can request and will usually receive a recess or continuance. An officer confronting a resisting arrestee must judge and act in a flash. Magistrates and lawyers do not act at the risk of life and limb, police officers do. If it is wrong, as this Court has held, to judge warrant magistrates and attorneys on the basis of hindsight, what fairness is there in

so judging police officers?

C.

CONFLICT WITH U.S. CIRCUITS AND STATE SUPREME COURTS

The common law rule was once unquestioned as the established law. Although it is questioned nowadays, two federal circuits and three state supreme courts have reaffirmed the constitutionality of the common law rule within the last decade or so. Connors v. McNulty, 697 F.2d 18 (1st Cir., 1983); Jones v. Marshall, 528 F.2d 132 (2nd Cir., 1975); Hilton v. State, 348 A.2d 242 (S.J. Ct. Maine, 1975); Schumann v. McGinn, 307 Minn 446, 240 N..2d 525, 531 (1976); Schumann v. St. Paul, ___ Minn. ___, 268 N.W.2d 903 (1978); Reese v. Seattle, 81 Wash.2d 374, 503 P.2d 64, 83 A.L.R.3rd 157 (1972), cert. den. 414 U.S. 832, 38 L.Ed.2d 67, 94 S.Ct. 169.

CONCLUSION

In conclusion, the Petitioners respectfully submit that the decision and opinion of the District Court in this case erroneously decides a novel question and conflicts with the prior decisions of this Honorable Court on the use of hindsight in judging official actions and with the decisions of numerous circuit and state supreme courts upholding the constitutionality of the common law rule. For these reasons, as well as the urgency and simplicity of the issue, the Petitioner prays that this Honorable Court will issue the writ of certiorari now and review the decision and opinion of the Honorable United States Distr ct Court for the Middle District of Alabama and on such review will reverse the

decision of said Court to the extent that the same holds that Section 13A-3-27, Code of Alabama, 1975, repugnant to the United States Constitution.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Charles A. Graddick, Attorney General and the State of Alabama, Petitioners, do hereby certify that on this ___ day of November, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for all of the other parties in the Court of Appeals, by mailing the same to them first-class postage prepaid and addressed as follows:

Honorable Robert C. Black
Attorney at Law
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JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

84-715 (2)

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA AND
CHARLES A. GRADDICK,
ATTORNEY GENERAL, PETITIONERS

VS.

DARRYL PRUITT, RESPONDENT

APPENDICIES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON III
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ATTORNEYS FOR PETITIONER

40 pp

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ATTORNEYS FOR PETITIONER

TABLE OF APPENDICIES

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

DARRYL PRUITT,	)
	)
Plaintiff,	)
	)
v.	)CIVIL ACTION NO.
	)83-T-903-N
THE CITY OF MONTGOMERY; et al.,	)
	)
Defendants	)

ORDER

Plaintiff Darryl Pruitt has brought this cause of action under 42 U.S.C.A. § 1983 and Alabama constitutional and tort law against defendants City of Montgomery, Alabama and Lester Kidd, formerly a city police officer. Pruitt seeks to recover for injuries he suffered when he was shot by Kidd.

This cause is now before the court on Pruitt's May 17, 1984, motion for summary judgment and the defendants' May 29, 1984, motion for summary judgment.

For reasons which follow, Pruitt's motion is due to be granted in part and denied in part, and the defendants' motion is due to be denied.

I.

On the night of September 2, 1982, Officer Kidd and another officer responded to radio reports of a suspected burglary in progress in a building on West Fairview Avenue in Montgomery. The suspects were described as black males. As Kidd walked near the rear of the building he encountered Pruitt, who is black, emerging from a bush. Pruitt immediately began to flee on foot. Kidd ran a few steps after Pruitt before deciding that he would be unable to overtake Pruitt. Kidd then shouted directions to Pruitt to "halt, police." When Pruitt failed to stop Kidd fired two shots at Pruitt from a twelve-gauge

shotgun. At least one of the shots struck Pruitt in the area of the buttocks, bringing him to the ground. Pruitt was searched at the scene and found to be unarmed.

Pruitt was subsequently arrested and charged with commission of a rape that had allegedly occurred in the building. A Montgomery County grand jury failed, however, to return an indictment on this charge. Also, there was no burglary as suspected.

The regulations of the Montgomery City Police Department authorize the use of deadly force if necessary to stop a fleeing felony suspect. These regulations are based upon an Alabama statute permitting law enforcement officers to use deadly force "[t]o make an arrest for a felony or to prevent the escape from custody of a person arrested

for a felony, unless the officer knows the arrest is unauthorized." 1975 Ala. Code §13A-3-27 (Supp. 1982).

Kidd testified by deposition that, relying on the State and City's deadly force policy, he shot Pruitt to prevent him from escaping arrest. Kidd stated that when he fired his weapon he considered Pruitt a prime burglary suspect, but he did not believe Pruitt posed a danger of death or bodily injury to anyone. Kidd stated that he would not have fired had he believed that other officers responding to the call would have intercepted Pruitt and effected an arrest.

II.

The parties have moved for a summary judgment on the issue of the liability of the City and Kidd for violation of

Pruitt's civil rights under § 1983 and Alabama constitutional and tort law.

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Furthermore, even when the underlying facts are undisputed, summary judgment should not be granted unless reasonable minds could not differ on the inferences to be drawn from those facts. See Warrior Tombigbee Transportation Co. v. M/ Nan Fung, 695 F.2d 1294, 1296-97 (11th Cir. 1983). This is an appropriate case for summary judgment.

In Ayler v. Hopper, 532 F. Supp. 198 (M.D.Ala. 1981), the court held that use of deadly force[1] to stop a fleeing or

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1. Alabama law defines deadly force as "[f]orce which, under the circumstances in which it is used, is readily capable

escaping felon constituted a civil rights violation actionable under § 1983 "unless the official has good reason to believe that the use of such force is necessary

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Footnote 1 continued:

of causing death or serious physical injury." 1975 Ala. Code § 13A-3-20(2) Supp. 1982). The Model Penal Code definition of deadly force is

> force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force.

Model Penal Code § 3.11(2)(1962). See Mattis v. Schnarr, 547 F.2d 1007, 1009 n.2 (8th Cir. 1976), vacated as moot sub nom., Ashcroft v. Mattis, 431 U.S. 171, 97 S.Ct. 1739 (1977). Under these definitions of deadly force, the defendants; contention that Kidd was not using deadly force because he intended to and did only wound Pruitt is untenable.

to prevent imminent, or at least a substantial likelihood of, death or great bodily harm." Id. at 201. See also Garner v. Memphis Police Department, 710 F.2d 240, 246 (6th Cir. 1983), cert. granted, ___ U.S. ___, 104 S.Ct. 1589 (1984); Mattis v. Schnarr, 547 F.2d 1007, 1020, (8th Cir. 1976), vacated as moot sub nom., Ashcroft v. Mattis, 431 U.S. 171, 97 S.Ct. 1739 (1977). Ayler held § 13A-3-27 of the 1975 Code of Alabama unconstitutional to the extent that it permitted use of deadly force in other circumstances. 532 F. Supp. at 201.

Officer Kidd's testimony about the shooting is clear and straightforward and permits only one reasonable conclusion: Kidd shot Pruitt to prevent him from escaping arrest, and not because he posed a danger of death or bodily injury to anyone. Kidd's use of deadly force under

these circumstances did not meet the Ayler standard and, therefore, violated Pruitt's civil rights.[2]

Municipalities are subject to § 1983 liability when a cognizable injury is inflicted by "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy...." Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38 (1978). See

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2. In Garner v. Memphis Police Department, 710 F.2d 240,, 246 (6th Cir. 1983), cert. granted, ___ U.S. ___, 104 S.Ct. 1589 (1984), the Sixth Circuit stated that "officers may be justified in using deadly force if the suspect has committed a violent crime or if they have probable cause to believe that he is armed or that he will endanger the physical safety of others if not captured." Id. at 246. Kidd's use of deadly force fails to meet the constitutional standard announced in Garner.

also e.g., William v. City of Valdosta, 689 F.2d 964, 969 (11th Cir. 1982). Here, the policy of the Montgomery City Police Department authorized the unconstitutional use of deadly force, and Pruitt's shooting was merely an execution of this policy. Taylor v. Collins, 574 F. Supp. 1554, 1559 (E.D. Mich. 1983). The City of Montgomery is, therefore, liable to Pruitt under § 1983 for the unconstitutional use of deadly force upon him.[3].

Kidd, on the other hand, maintains that, even if his use of deadly force was unconstitutional, he is "qualified immune" from any liability. Harlow v.

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3. The only issue left for trial on Pruitt's § 1983 claim against the City is the amount of damages.

Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982).[4] The court declines to reach this issue at this time. Pruitt has informed the court that he may dismiss his claims against Kidd in the event the city is found liable on the § 1983 claim.

Pruitt has also asserted causes of action under Alabama consitutional and tort law under the pendent claims doctrine of United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130 (1966). In light of the court's disposition of the § 1983 claim against the City, the court does not see a need to address the state law claims at this time.

Accordingly, for the reasons stated above, it is ORDERED:

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4. The good faith or qualified immunity, if any, of a municipal agent executing city policy does not alter the municipality's liability. Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398 (1980).

(1) That the plaintiff's May 17, 1984, motion for summary judgment be and it is hereby granted in his favor and against defendant City of Montgomery Alabama on the issue of liability under 42 U.S.C.A. § 1983; and that said motion be and it is hereby denied in all other respects; and

(2) That the defendants' May 29, 1984, motion for summary judgment be and it is hereby denied.

If is further ORDERED that this cause be and it is hereby set for a second pretrial conference on June 13, 1984, at 4:00 p.m. at the federal courthouse in Montgomery, Alabama. The clerk of the court is DIRECTED to notify the parties by telephone.

DONE, this the 12th day of June, 1984.

/s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

DARRYL PRUITT,	)
	)
Plaintiff,	)
	)
v.	)CIVIL ACTION NO.
	)83-T-903-N
THE CITY OF MONTGOMERY; et al.,	)
	)
Defendants	)

ORDER

The court is of the opinion that the order entered in this cause on June 12, 1984, should be amended by substituting the following paragraph for the final paragraph at the end of Part I of the order, appearing on page 2.

> Kidd testified by deposition that, relying on the State and City's deadly force policy, he shot Pruitt to prevent him from escaping arrest. Kidd testified that, when he first encountered Pruitt emerging from a darkened bush, Pruitt was about to attack him so he raised his shotgun to "high port", whereupon Pruitt veered

> and began running away. Kidd stated that he began to give chase but quickly became convinced that the could not overtake Pruitt and effect an arrest. At that point, Kidd shouted a command for Pruitt to stop and fired when that command was unheeded. Although Kidd testified that he initially feared an attack from Pruitt, his deposition testimony repeatedly indicates that Kidd's own subjective concern was for effecting Pruitt's arrest, and not for his own or another's safety.

Accordingly, it is ORDERED that the June 12, 1984, order be and it is hereby amended as indicated above.

DONE, this the 26th day of July, 1984.

/s/ Myron Thompson
UNITED STATES DISTRICT JUDGE

APPENDIX B

§13A-3-26 DEFENSES §13A-3-27

* * * * *

§13A-3-27. USE OF FORCE IN MAKING AN ARREST OR PREVENTING AN ESCAPE.

(a) A peace office is justified in using that degree of physical force which he reasonably believes to be necessary, upon a person in order:

(1) To make an arrest for a misdemeanor, violation or violation of a criminal ordinance, or to prevent the escape from custody of a person arrested for a misdemeanor, violation or violation of a criminal ordinance, unless the peace officer knows that the arrest is unauthorized; or

(2) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical

force while making or attempting to make an arrest for a misdemeanor, violation or violation of a criminal ordinance, or while preventing or attempting to prevent an escape from custody of a person who has been legally arrested for a misdemeanor, violation or violation of a criminal ordinance.

(b) A peace officer is justified in using deadly physical force upon another person when and to the extent tnat he reasonably believes it necessary in order:

(1) To make an arrest for a felony or to prevent the escape from custody of a person arrested for a felony, unless the officer knows that the arrest is unauthorized; or

(2) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly

physical force.

(c) Nothing in subdivision (a)(1), or (b)(1) or (f)(2) constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to persons being arrested or to innocent persons whom he is not seeking to arrest or retain in custody.

(d) A peace officer who is effecting an arrest pursuant to a warrant is justified in using the physical force prescribed in subsections (a) and (b) unless the warrant is invalid and is known by the officer to be invalid.

(e) Except as provided in subsection (f), a person who has been directed by a peace officer to assist him to effect an arrest or to prevent an escape from custody is justified in using physical force when and to the extent that he

reasonably believes that force to be necessary to carry out the peace officer's direction.

(f) A person who has been directed to assist a peace officer under circumstances specified in subsection (e) may use deadly physical force to effect an arrest or to prevent an escape only when:

(1) He reasonably believes that force to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(2) He is authorized by the peace officer to use deadly physical force and does not know that the peace officer himself is not authorized to use deadly physical force under the circumstances.

(g) A private person acting on his own account is justified in using physical force upon another person when and to the

extent that he reasonably believes it necessary to effect an arrest or to prevent the escape from custody of an arrested person whom he reasonably believes has committed a felony and who in fact has committed that felony, but he is justified in using deadly physical force for the purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

(h) A guard or peace officer employed in a detention facility is justified:

(1) In using deadly physical force when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the escape of a prisoner accused or convicted of a felony from any detention facility, or from armed escort or guard;

(2) In using physical force, but not deadly physical force, in all other circumstances when and to extent that he reasonably believes it necessary to prevent what he reasonably believes to be the escape of a prisoner from a detention facility.

(3) "Detention facility" means any place used for the confinement, pursuant to law, of a person:

a. Charged with or convicted of an offense; or

b. Charged with being or adjudicated a youthful offender, a neglected minor or juvenile delinquent; or

c. Held for extradition; or

d. Otherwise confined pursuant to an order of a criminal court. (Acts 1977, No. 607, p. 812, § 630; Acts 1979, No. 79-599, p. 1060, § 1)

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-7571

DARRYL PRUITT,

(PLAINTIFF)-APPELLEE

VS.

CITY OF MONTGOMERY AND LESTER G. KIDD,

(DEFENDANT)-APPELLANTS

AN APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT
OF ALABAMA

(CIVIL ACTION NO. 83-T-903-N)

ON MOTION TO INTERVENE BY THE STATE
AND THE ATTORNEY GENERAL OF ALABAMA

(28 U.S.C. 2403)

MOTION OF THE STATE OF ALABAMA AND CHARLES A. GRADDICK, ATTORNEY GENERAL, UNDER 28 U.S.C. 2403, TO INTERVENE FOR THE SOLE PURPOSE OF DEFENDING THE CONSTITUTIONALITY OF SECTION 13A-3-27, CODE OF ALABAMA, 1975 AND THE PUBLIC INTEREST OF THE PEOPLE OF ALABAMA

Come the State of Alabama and Charles A. Graddick, Attorney General of Alabama, and move to intervene in the above styled cause under Title 28, United States Code, Section 2403 for the sole purpose of defending the Constitutionality of Title 13A, Section 13A-3-27, Code of Alabama, 1975 and the public interest of the People of the State of Alabama. The grounds for this motion are as follows:

1. Your movant, Charles A. Graddick, is the duly elected Attorney General of Alabama.

2. In the instant case the District Court ruled that Section 13A-3-27, Code of Alabama, 1975, is unconstitutional to the extent that it excuses the use of deadly force by a police officer, where such force is necessary to overcome

resistance to lawful arrest for a felony, in situations where the officer has no "...good reason to believe that the use of such force is necessary to prevent imminent, or at least a substantial likelihood of, death or great bodily harm...." (Mns. Op. p. 3).

3. The public interest of the People of Alabama, including the protection of life, the control of violence and the advancement of the Rule of Law, requires that clear limits be set by the law on the nature and extent of force which is justified in overcoming resistance to a lawful arrest. Such limits must be susceptible to practical application in emergency situations where police officers must make quick decisions based on a minimum of information.

4. Section 13A-3-27, Code of Alabama, 1975, represents the State of Alabama's effort to set such limits. Under Section 13A-3-27 prosepective arrestees know the exact limits of the force which may be used against them, should they choose to resist arrest, and police officers know the exact extent to which the law will hold them justified, if they use force to overcome resistance to a lawful arrest.

5. Section 13A-3-27, Code of Alabama, 1975 is constitutional

6. This case was docketed into this Honorable Court on September 5, 1984.

7. The record has not been filed in this case and is not due until sometime in October.

Therefore, the premises considered, your movants pray that this Honorable Court will allow them to intervene in this cause for the limited purposes set out above.

Respectfully submitted,

/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL

/s/ Joseph G. L. Marston III
ASSISTANT ATTORNEY GENERAL
ATTORNEY FOR MOVANTS

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, Assistant Attorney General of Alabama and attorney for the movants herein, do hereby certify that on this 14th day of September, 1984, I did serve copies of the foregoing on the attorneys for the parties by mailing the same to them first class postage prepaid and addressed as follows:

Honorable Robert C. Black
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Honorable N. Gunter Guy
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Honorable Ira B. Burnin &
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/s/ Joseph G. L. Marston III
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APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-7571

DARRYL PRUITT,

Plaintiff-Appellee,

versus

THE CITY OF MONTGOMERY,
ALABAMA, et al.,

Defendants-Appellants

- - - - - - - - - - - - -

On Appeal from the United States
District Court for the Middle
District of Alabama

O R D E R:

The motion of the State and Attorney General of Alabama for leave to intervene is granted.

/s/ Robert R. Vance
UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CITY OF MONTGOMERY, ALABAMA,	)	
Defendant-Appellant,	)	
vs.	)	No. 84-7571
DARRYL PRUITT,	)	
Plaintiff-Appellee.	)	

MOTION FOR STAY OF PROCEEDINGS ON APPEAL

Now comes the appellee, Darryl Pruitt, and moves that this Court stay the proceedings on appeal until the U.S. Supreme Court issues its decision in Memphis Police Department v. Garner, ___ U.S. ___, 104 S.Ct. 1489 (1984) (granting cert.), and its companion case, State of Tennessee v. Garner, ___ U.S. ___, 104 S.Ct. 1589 (1984) (prob. juris. noted).

In support of his motion, appellee states:

1. The Garner litigation, pending in the U.S. Supreme Court, presents an issue which controls the disposition of this case, namely, whether the U.S. Constitution forbids law enforcement officers from using deadly force to arrest suspected felons who are not dangerous. In Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983), the U.S. Court of Appeals for the Sixth Circuit held that the use of deadly force in such circumstances is unconstitutional. The Memphis Police Department, joined by the State of Tennessee, appealed that ruling to the U.S. Supreme Court, which granted certiorari on March 19, 1984. Oral argument in the case is scheduled for October 30, 1984. A

decision is anticipated by March of next year.

2. The decision of the district court challenged in the instant case rests on the same legal proposition at issue in Garner. The instant case concerns the shooting of a black teenager who was allegedly fleeing from the scene of a burglary. A City of Montgomery police officer fired two shotgun blasts at the plaintiff, leaving him paralyzed in one leg. (The police tip that a burglary was in progress turned out to be mistaken. No burglary was in progress or had occurred). The district court granted partial summary judgment against the City of Montgomery, finding that plaintiff had been shot pursuant to an unlawful City policy that permitted police officers to use deadly force to arrest non-dangerous felons.

Relying on its decision in Ayler v. Hopper, 532 F.Supp. 198 (M.D.Ala., 1981), the district court held that "the use of deadly force to stop a fleeing ... felon constitute[s] a civil rights violation actionable under §1983 'unless the [police] official has good reason to believe that the use of such force is necessary to prevent imminent, or at least a substantial likelihood of, death or great bodily harm." Pruitt v. City of Montgomery, No. 83-T-903-N, slip. op. at 3 (June 12, 1984) (order granting partial summary judgment).[1] The court found that the defendant City's shooting policy did not conform to the standard laid down in Ayler. Moreover, the court found that no genuine issue of fact existed

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1. A copy of the court's order and a later amendment to the order is attached to this motion.

concerning whether the officer who shot plaintiff believed that his use of deadly force was necessary to prevent death or great bodily harm. The court wrote:

> Officer Kidd's testimony about the shooting is clear and straightforward and permits only one reasonable conclusion: Kidd shot Pruitt to prevent him from escaping arrest, and not because he posed a danger of death or bodily injury to anyone. Kidd's use of deadly force under these circumstances ... violated Pruitt's civil rights.

Id. at 4. The court therefore granted summary judgment in the plaintiff's favor on the issue of liability. A jury later awarded plaintiff damages in the amount of $100,000.

3. Because the outcome of Garner will have a profound impact on the law that controls this case, plaintiff submits that it would be appropriate for this Court to stay the instant appeal

until a decision is issued in Garner. It would require a substantial investment of time and resources for the parties to brief, and for this Court to decide, the determinative question in this case of whether it violates the constitution for a city to permit its police officers to use deadly force to arrest non-dangerous felons. Because in the end this Court's resolution of this issue will be controlled by the U.S. Supreme Court's decision in Garner, the expenditure of such time and resources will not materially advance this litigation.

WHEREFORE, plaintiff prays that this Court enter an order staying the instant proceedings until the U.S. Supreme Court issues a decision in the Garner litigation.

Respectfully submitted,

/s/ Dennis Sweet
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205 264-0286

ATTORNEYS FOR APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon counsel for appellants and upon the Attorney General of the State of Alabama by first class U.S. mail, this 11th day of October, 1984.

/s/ Dennis Sweet
Attorney for Appellee

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Charles A. Graddick, Attorney General and the State of Alabama, do hereby certify that on this ___ day of November, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for all of the other parties in the Court of Appeals, by mailing the same to them first-class postage prepaid and addressed as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-715

STATE OF ALABAMA AND
CHARLES A. GRADDICK, ATTORNEY GENERAL,

Petitioners,

v.

DARRYL PRUITT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
(BEFORE FINAL JUDGMENT)

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

53 pp

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

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ATTORNEYS FOR RESPONDENT

STATEMENT OF THE ISSUES

I. Does the Court have jurisdiction?

II. Would it be improvident for the Court to grant certiorari in advance of judgment in the court of appeals when that court may obviate the need for a constitutional decision by ruling on non-constitutional grounds not presented in the petition?

III. Are there any circumstances that justify the extraordinary departure from normal appellate practice sought by petitioners?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES:

OTHER AUTHORITIES:

JURISDICTION

Respondents argue that the Court lacks jurisdiction to hear a petition for certiorari filed by the State of Alabama and its Attorney General, who have intervened in this suit pursuant to 28 U.S.C. §2403(b), because the parties between whom there is an Article III controversy have not sought review in this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

In an opinion dated June 12, 1984, a copy of which is set forth in Appendix A to the petition,[1] the district court found unconstitutional the City of Montgomery's

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[1]Citations to the appendices to the petition for a writ of certiorari are in the form of App.___. Citations to the record below are to the record in the U.S. Court of Appeals for the Eleventh Circuit, which by order has been retained in the district court for the use of the parties.

policy governing the use of deadly force to arrest nondangerous suspected felons. The district court's decision is supported by the Fourth and Fourteenth Amendments to the U.S. Constitution.

STATUTORY PROVISIONS INVOLVED

One of the issues presented in the appeal below is the constitutionality of the City of Montgomery's policy governing the use of deadly force to arrest nondangerous suspected felons. This policy is taken from Alabama Code §13A-3-27 (1975), a codification of the common law rule that a law enforcement officer may use deadly force as a last resort to arrest a fleeing suspected felon. A copy of the statute is set out in Appendix B to the petition.

Also involved here is 28 U.S.C. §2403(b), which provides:

"In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

STATEMENT OF THE CASE

On August 26, 1983, respondent filed in the U.S. District Court for the Middle District of Alabama a complaint for damages alleging that he had been shot and partially paralyzed by a City of Montgomery police officer in violation of

federal and state law. (R. 11-17). The complaint named as defendants: former police officer Lester Kidd, the officer who had fired at respondent while attempting to arrest him; the City of Montgomery; and the mayor and police chief of the City. (Id.). Respondent later voluntarily dismissed both the mayor and the police chief from the suit. (R. 55-57).

Respondent's first claim was that former police officer Kidd had shot him in violation of Alabama law, which permits a police officer to use deadly force to effect an arrest only as a last resort. In addition, repondent claimed that the City of Montgomery's policy governing the use of deadly force, pursuant to which Kidd shot respondent, is unconstitutional because it permits officers to shoot suspected felons whom the police do not believe to be dangerous. (R. 11-17).

On May 17, 1984, respondent moved for partial summary judgment against the City of Montgomery. (R. 64-72). In his motion, respondent argued that former officer Kidd was acting pursuant to the City of Montgomery's unconstitutional policy governing the use of deadly force when he shot respondent and that the City was therefore liable to respondent as a matter of law. (Id.) In its response to the motion, the City acknowledged that officer Kidd had acted pursuant to City policy, but denied that the policy was unconstitutional. (R. 85-89).

The district court granted respondent's motion for summary judgment on June 12, 1984. (R. 90-95). The court held that it is unconstitutional for police officers to use deadly force to arrest a suspected felon whom the police do not reasonably believe to be

dangerous.[2] The court found as a matter of undisputed fact that:

> Officer Kidd's testimony about the shooting is clear and straightforward and permits only one reasonable conclusion: Kidd shot Pruitt to prevent him from escaping arrest, and not because he posed a danger of death or bodily injury to anyone.

(R. 93; App. 7). Thus, the Court held that "Kidd's use of deadly force under these circumstances did not meet the [constitutional] standard and, therefore, violated Pruitt's civil rights." (R. 93; App. 8).

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[2] The court wrote that "the use of deadly force to stop a fleeing or escaping felon constitute[s] a civil rights violation actionable under §1983 'unless the [law enforcement] official has good reason to believe that the use of such force is necessary to prevent imminent, or at least a substantial likelihood of, death or great bodily injury.'" (citing Ayler v. Hopper, 532 F.Supp. 198, 201 (M.D. Ala. 1981)). (R. 92; App. 5-7).

The City of Montgomery asked the district court to certify for interlocutory appeal, pursuant to 28 U.S.C. §1292(b), the question of the lawfulness of its deadly force policy. The court declined to do so, and on July 27, 1984, the parties tried to a jury the issue of compensatory damages for respondent's injuries. (R. 6). The jury returned a verdict of $100,000. (R. 211). Pursuant to Rule 54(a), Fed.R.Civ.P., the court entered a judgment against the City on the basis of the jury's verdict. (R. 212).

On August 23, 1984, the City appealed. (R. 224). Respondent moved for a stay of proceedings on appeal pending the decision of this Court in Tennessee v. Garner, Nos. 83-1035, 83-1070 (argued

Oct. 30, 1984).[3] The stay was denied.[4] The State of Alabama and its Attorney General, Charles Graddick, moved to intervene in the appeal, pursuant to 28 U.S.C. §2403. Their motion was granted on October 9, 1984. The State and Attorney General Graddick then filed in this Court a petition for a writ of certiorari before judgment in the court of appeals. The City of Montgomery neither joined the petition nor filed such a petition itself.[5]

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[3] The record of proceedings in the court of appeals has not been compiled. Therefore, this statement cannot refer to that record.

[4] Respondent's motion for a stay was denied on November 2, 1984, after the petition for a writ of certiorari was filed.

[5] The City's brief on the merits for the court of appeals is due on December 12, 1984.

STATEMENT OF THE FACTS

On the evening of September 1, 1982, Darryl Pruitt, an 18-year-old black man, and four of his friends, two young men and two young women, walked to a commercial area on Fairview Avenue in Montgomery, Alabama. (P. 6, 14-15).[6] He and one of the young women, Sharon Brown, went together behind 614 W. Fairview Avenue, where they engaged in sexual intercourse. (P. 18). Darryl believed that Sharon, who was already the mother of a young child, was 17; he later heard that she was "something like 15, 16". (P. 16). After their sexual encounter, while Darryl was leaving the area behind 614 W. Fairview Avenue, a patrol car arrived on the scene.

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[6]This statement of facts relies primarily on the depositions of respondent and former officer Kidd. Citations to respondent's deposition are in the form of P.__. Citations to Kidd's deposition are in the form of K.__.

(P. 19). Apparently, a citizen who had heard noises behind 614 W. Fairview Avenue had reported to the police a possible burglary in progress. (Pl. Ex. 6; R. 77).[7] The citizen had told the police that three young black males were involved. (K. 16).

There were two officers in the patrol car. (K. 15). As their car approached the scene, the senior officer let the junior police officer, Lester Kidd, out on an intersecting street. (K. 15-16, 29.) Kidd, who had just completed his period of probationary employment with the Montgomery police department, was armed with, among other weapons, a billy club

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[7]Citations in the form of Pl. Ex.__ are to the exhibits to the depositions taken below. Citations in the form of Tr.__ are to the transcript of the trial on damages.

and a shotgun. (K. 9, 51). Kidd walked toward the rear of 614 W. Fairview while the senior officer pulled around to the front of the building. (K. 15- 17, 51). Kidd carried a walkie-talkie and was in continuous radio contact with both his senior officer and other patrol cars that, in accordance with standard procedure, were converging on the scene in order to secure the area. (K. 18, 21-23, 27-28, 30-31).

According to former officer Kidd's deposition, Kidd was familiar with the area behind 614 W. Fairview, which was wooded and overgrown. (K. 17). As Kidd approached the back of 614 W. Fairview, his senior officer reported on the walkie-talkie that he had two suspects in custody at the front of the building. (Id.). Kidd walked two or three steps and then Darryl Pruitt "came out of [some] bushes." (K.

18-19, 33). Darryl was very close to Kidd at the time. (K. 33). Kidd testified that he believed Darryl was the third of the three youths suspected of burglarizing 614 W. Fairview Avenue. (K. 19, 30-31). Just as he saw Darryl, Kidd heard a second patrol car pull up out front. (K. 24). Within seconds, he heard another patrol car arrive at the same location. (K. 25). Kidd did not know whether other patrol cars had arrived on any of the streets that bordered the area behind 614 W. Fairview, including the street on which Kidd had been let off. (K. 31-32).

When Darryl came down the path toward Kidd, Kidd raised his shotgun to a high port position. (K. 19). Kidd, who had a good view of Darryl, thought that he was a "young black male... in his teens." (K. 33-35). He saw that Darryl was dressed in a light-colored T-shirt, dark trousers, and tennis shoes, and observed no weapons

in his possession. (K. 33-34, 38). Darryl then took "about three steps" toward Kidd, "veered off to the right," and ran away "like he was O.J. Simpson." (K. 39). Kidd described what happened next as follows:

> At this time I was thinking this was the third subject that was involved in the burglary coming from the back. I knew the subject had to have been looking at me because I didn't hear anything until I more or less ran up on this bush. When I got too close, he jumped out.
>
> ... the subject came at me and veered off to the right. I said, "Halt, police." The subject kept running. I yelled, "Halt, police" again... Then I yelled a third time and the subject went down into a ditch. And when he came up out of the ditch I had to make a decision whether I was going to stop this fleeing felon or what I was going to do.
>
> ... And I shot the first round and the subject kept moving, and I shot the second round and ... I heard the subject yell and he fell.

(K. 19-20). At his deposition, Kidd offered:

> I guess he was waiting for me to walk by and then he was going to be gone. But I must have walked straight into his path. I boxed him in.
>
> Q. He had to go around you to get out?
>
> A. (Witness nods head in the affirmative.)

(K. 41-42).

Kidd did not use his walkie-talkie to inform his senior officer or the other patrol cars on the scene that he had spotted Darryl (K. 34), nor did he see Sharon Brown, Darryl's sexual partner, before he shot (K. 62). Kidd knew that it was proper to arrest fleeing suspects in like circumstances by calling in other units to cut off the suspect's avenues of escape. (K. 21-24, 27-28, 42-44).

Darryl's body was raked by buckshot. (P. 20, 38-39; Tr. 111-112). He was treated on the scene by emergency medical technicians and then taken to a hospital, where he remained for over 6 weeks. (K.

22, 25-26; Tr. 75). It was over a year before he was able to walk again (K. 27), a feat he finally accomplished after being fitted with a leg brace. (Tr. 79, 92, 120). His right leg is permanently paralyzed. (Tr. 80, 90).

After the shooting, Kidd wrote out a narrative account of his version of the incident. (K. 64-65). The narrative, which the City claims has been lost, was not produced in discovery. A statement was also taken from Kidd by an investigator from the Montgomery County Sheriff's Department. (K. 66; Pl. Ex. 1). In that statement, Kidd made no mention of either Darryl's coming "out of the bushes" or Darryl's coming "at" him. (Pl. Ex. 1).

When asked at his deposition why he shot Darryl, Kidd stated that:

> At the time I shot Darryl Pruitt my thinking was that he was a fleeing felon coming from a burglary; that he also had made an attempt to physically harm a

> police officer but he avoided that attempt and he was a subject that I felt needed to be stopped.

(K. 84). The "attempt to ... harm a police officer" to which Kidd referred was the incident in which Darryl had come out of the bushes and come "at" Kidd. (K. 40). According to Kidd:

> once I walked up on him he tried to come out of the bushes and he was coming toward me and I felt he was going to try to hit me and knock me down and either try to get away or either we were going to tangle or whatever.

(R. 35-36). Kidd acknowledged, nevertheless, that despite this previous "attempt to physically harm a police officer," Kidd did not believe at the time he shot Darryl that Darryl was likely to harm Kidd or anyone else if he was not stopped. (K. 84).

It turned out that the citizen's report had been incorrect; a burglary had not been in progress at 614 W. Fairview

Avenue. (R. 77). Sharon Brown's mother swore out a complaint against Darryl for statutory rape (P. 32-33; R. 77), see Ala. Code §13A-6-2 (1975) (rape in second degree), but a grand jury refused to return an indictment, and Darryl was not prosecuted (P. 32; R. 77).

SUMMARY OF ARGUMENT

Serious questions exist concerning the Court's jurisdiction to hear the State's and Attorney General Graddick's petition. The City of Montgomery has not petitioned for review in this Court. The only interest of the State and the Attorney General in this case is in the Court's determining an abstract question of law, since the State cannot be liable for damages, see Quern v. Jordan, 440 U.S. 332 (1979), nor enjoined by respondent, see Los Angeles v. Lyons, --- U.S. ---, 75 L.Ed.2d 675 (1983). Because respondent

seeks no relief against the intervenors, there is no Article III "case or controversy" between petitioners and respondent.

Although petitioners suggest that Garner and the instant case are virtually identical, each presenting a single pure issue of constitutional law, there are in fact at least two potentially dispositive, nonconstitutional questions present in this case. These other issues are not raised by the State's and Attorney General Graddick's petition because these intervenors lack standing to raise them. 28 U.S.C. §2403(b) (intervention limited to "proper prosecution of the facts and laws relating to the question of constitutionality" of statute at issue). Thus, in its present posture, the Court would be unable to resolve the case on these dispositive nonconstitutional grounds if the case reaches the Court as a

result of the petition. "[F]ew propositions are better established than that constitutional adjudication should be avoided whenever possible." Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 506 (9th Cir. 1979).

Petitioners urge the Court to grant a writ of certiorari in advance of judgment in the court of appeals so that this case may be considered in connection with Tennessee v. Garner, Nos. 83-1035, 83-1070 (argued Oct. 30, 1984). As petitioners acknowledge, the relief they seek "is an extraordinary departure from normal [appellate] procedure and [is] permitted only in extraordinary circumstances." Pet. at 21; see Rule 18, Rules of the Supreme Court. Such extraordinary circumstances are not present here. Considering this case along with Garner would neither assist the Court in its resolution of the

constitutional question raised in Garner nor expedite a decision of the constitutional issue petitioners seek to raise here.

REASONS FOR DENYING THE WRIT

I.

THE COURT LACKS JURISDICTION TO HEAR THE CONSTITUTIONAL ISSUE RAISED BY PETITIONERS

The City of Montgomery, the appellant below, is not a petitioner in this Court. Only the statutory intervenors, the State of Alabama and its Attorney General, Mr. Charles A. Graddick, have asked the Court to issue a writ in advance of judgment in the court of appeals. As a result, a serious question exists concerning whether this Court has jurisdiction to hear the issue raised in the petition. Cf. Graddick v. Newman, 453 U.S. 928 (1981).

The court of appeals permitted the State and Mr. Graddick to intervene in this case pursuant to 28 U.S.C. §2403(b),

which bestows upon a state the right to appear in cases in which the constitutionality of one of its enactments is drawn into question. The statute limits a state's participation in such cases, however, to defending the constitutionality of the challenged enactment. 28 U.S.C. § 2403(b). Under the statute, petitioners are not parties in the full sense, but "only to the extent necessary for a proper presentation of the facts and the law relating to the question of constitutionality." Id.

Respondent submits that there is in fact no Article III "case or controversy" between petitioners and respondent. Respondent has not sought, and it cannot seek, any relief against the State of Alabama or Attorney General Graddick. See Los Angeles v. Lyons, --- U.S. ---, 75 L.Ed.2d 675 (1983); Quern v. Jordan, 440

U.S. 332 (1979). The district court granted no such relief. Petitioners, therefore, lack standing to seek review in this Court of the district court's decision.

There is no indication that Congress intended to authorize intervenors under 28 U.S.C. §2403(b) to petition in this Court for certiorari in cases in which there is no Article III "case or controversy" between the respondents and them. 28 U.S.C. §2403(b) (state shall have rights of a party "subject to ... applicable provisions of law"). Even if it so intended, Congress could not in light of Article III's "case or controversy" requirement constitutionally authorize the Court to hear such petitions from §2403(b) intervenors.[8]

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[8] The issue of §2403(b) intervenors' right to take appeals in this Court is of little moment in a case such as Garner, in

If the City and respondent had resolved their differences and settled the case, the State and Attorney General Graddick could not petition this Court to determine as an abstract matter the constitutional question raised by them here. Cf. Muskrat v. United States, 219 U.S. 246 (1911). That the State

> has a strong interest in obtaining a ruling on this question ... may be so, but the desirability of an advisory opinion is not a substitute for justiciability .... There is a

---

which the defendant below as well as the §2403(b) intervenors sought and obtained review in this Court. In such a case, parties with an Article III "case or controversy" have come before the Court, and the state-intervenors' participation in the case raises no question of constitutional dimensions. In this case, however, in which neither plaintiff nor defendant has sought review in this Court, the constitutional issue must be addressed before the Court renders any decision on the substantive issue raised by petitioners.

> difference between permitting the [Government] to play an active role during the pendency of private litigation, and permitting it to go forward with the litigation in its own right after the private parties have composed their differences. To do the latter, ... the Government must possess some independent basis as a party apart from its status as intervenor under the ... statute[] in question.

Ruotolo v. Ruotolo, 572 F.2d 336, 338-39 (1st Cir. 1978)(referring to intervention by the United States under §2403(a)). Although the parties in this case have not settled, the opinion sought by the State and the Attorney General is no less advisory, as was widely noted by commentators at the time of the enactment of §2403:[9]

---

[9]Section 2403 is a surviving remnant of the New Deal court-packing bill. See Legislation, 51 Harv.L.Rev. 148 (1937); Legislation, Revision of Procedure in Constitutional Litigation: The Act of 1937, 38 Colum.L.Rev. 151 (1938).

> [I]nsofar as the Act permits the United States to appeal from a decision to which it could not otherwise have been a party, serious constitutional questions will probably be raised.... [T]he original parties ... could decline to appeal. [A] challenge to the Court's jurisdiction would present the question whether the Attorney General has sufficient interest to permit him to appeal alone. The Court has consistently refused to adjudicate abstract questions, or questions which are or have become moot, or which do not permit of a decree or judgment, holding such cases beyond its constitutional powers under Article III of the Constitution. Should the appeal of the Attorney General be heard without the Court permitting itself to rule on the rest of the decision of the lower court, since no judgment or decree would run against the government, there would be no issue in the upper court except the abstract question of the constitutionality of the statute.

Legislation, 51 Harv.L.Rev. 148, 149-50 (1937) (footnotes omitted); see also Legislation, Revision of Procedure in Constitutional Litigation: The Act of 1937, 38 Colum.L.Rev. 153, 159-60 (1938).

The existence in this case of a novel jurisdictional question strongly counsels against this Court's granting the State's and Attorney General Graddick's petition. The Court would have to consider a dispute over jurisdiction of constitutional dimensions, the resolution of which would serve little if any practical purpose. In addition, the necessity for addressing this jurisdictional matter would likely prevent an expedited review of the case and delay a decision until well after the Court issues its decision in Garner, obviating any benefit from granting certiorari before judgment in the court of appeals.

II.

IT WOULD BE IMPROVIDENT FOR THE COURT TO GRANT CERTIORARI WHEN THE COURT OF APPEALS MAY OBVIATE THE NEED FOR A CONSTITUTIONAL DECISION BY RULING ON NONCONSTITUTIONAL GROUNDS NOT PRESENTED BY THE PETITION

The petitioners contend that this case presents only one legal issue, the constitutionality of Alabama's law governing the use of deadly force. While this is, indeed, the only issue that petitioners are permitted to address under 28 U.S.C. §2403(b), it is not the only issue presented by this case. In fact, this constitutional issue is unlikely to be the dispositive primary focus of the appeal now pending.

Both the appellant City and the respondent Pruitt intend to argue in the court of appeals that the court need not reach the constitutionality of the City of Montgomery's shooting policy in deciding the instant case. As noted above, the issue of liability in this case was decided on summary judgment. In its opposition to respondent's motion for a stay of proceedings in the court of appeals, the City argued that the primary

issue on appeal is whether there are genuine issues of fact in this case precluding summary judgment:

> The appeal involves not only a a question of the constitutionality of the Fleeing Felon Law but whether or not it was proper to grant a Motion for Summary Judgment in light of the Defendant Kidd's repeated assertions that at the time he shot the Plaintiff he was in fear for his life...
>
> The question of whether or not the Fleeing Felon Law is constitutional is important in the case but is not going to be the deciding factor.

Response to Motion to Stay, ¶2.

The court found on the evidence as a whole that no genuine issue existed concerning whether Kidd reasonably believed that respondent was dangerous when Kidd shot him. (R. 93). If the court of appeals holds that this finding by the district court was erroneous, then it will have no occasion to address the constitutional issue raised here by

petitioner. The case will be remanded to the district court for a trial on respondent's constitutional and pendent state law claims. If the jury then finds for respondent on his state law claims, or if it finds for the defendants, there will be no need to decide the issue of the constitutionality of the City's shooting policy.[10]

Similarly, respondent intends to argue that the court of appeals need not address the constitutional issue because the district court's summary judgment is supported not only by respondent's constitutional theory, but also by his state law theory. Kidd admitted that he knew that the two "accomplices" were

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[10]The City also intends to complain on appeal of the district court's conduct of the trial on damages, which resulted in a $100,000 verdict for respondent. As the City stated in its opposition to the motion for a stay, it intends to challenge

already in custody (K. 17-18), a fact that petitioners concede, Pet. at 12. Thus, Kidd's conduct was unlawful under the common law rule, codified in Alabama Code §13A-3-27 (1975), because it was neither necessary nor reasonable for Kidd to shoot respondent in order to secure his capture.[11] *See Union Indemnity Co. v. Webster*; 218 Ala. 468, 118 So. 794 (1928); *see also* Ala. Code §13-A-3-27(1975). Kidd and his fellow officers could have interrogated the two suspects in custody in order to determine respondent's identity and locate him for arrest.

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on appeal "the granting of various motions in limine" as well as the court's failure to allow the trial of respondent's pendent state claims at the same time it tried the issue of damages. Response to Motion to Stay ¶2.

[11] Under Alabama law, respondeat superior applies and the City of Montgomery is liable to respondent if Kidd used excessive force in arresting respondent. *City of Birmingham v. Thompson*, 404 So.2d 589 (Ala. 1981).

Other alternatives short of deadly force, which under state law must first be exhausted, also were available.[12]

Because the appeal pending below thus presents a number of dispositive legal

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[12]For example, Kidd, based upon his knowledge of the terrain, believed that respondent was planning to exit the area behind 614 W. Fairview Avenue at a point near an electric power station abutting an intersecting street (K. 36, 39, 50-51); he therefore could have directed the other police units present and converging on the scene to intercept the respondent when he exited the wooded area and, by massing a force at this location, to convince him to surrender. (K. 54-57). Kidd acknowledged in his deposition that he had been trained to employ such a tactic in similar circumstances. (K. 21-24, 27-28, 42-44). Kidd was aware when he shot respondent both that there were at least two other police units in cars already present and that other units were speeding to the scene. (K. 25,27-28, 30-31). Kidd was equipped with a walkie-talkie (K. 18), was in continuous radio contact with the other units (K. 22-23, 54), and could easily have followed this procedure. In his deposition, Kidd offered no explanation for his failure to employ this practice, designed to provide an effective alternative to the use of deadly force in circumstances such as those presented here.

questions that may obviate the need for either this Court or the court of appeals to render an opinion on the constitutionality of Montgomery's deadly force policy, it would be improvident for the Court to grant a writ of certiorari before judgment as requested by the petitioners. "[F]ew propositions are better established than that constitutional adjudication should be avoided whenever possible. Bowen v. United States, 422 U.S. 916 ... (1975); Ashwander v. TVA, 297 U.S. 288 ... (1936)(Brandeis, J., concurring)." Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 506 (9th Cir. 1979). The intervenors' petition urges this Court to rush headlong into an untimely and unnecessary constitutional decision. The Court should decline petitioners' invitation.

III.

THERE ARE NO CIRCUMSTANCES THAT JUSTIFY THE EXTRAORDINARY DEPARTURE FROM NORMAL APPELLATE PRACTICE SOUGHT BY PETITIONERS

A. The Constitutional Question Presented in the Petition Does Not Require the Immediate Attention of this Court.

A petition for certiorari to review a case pending in the court of appeals should be "granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Rule 18, Rules of the Supreme Court. Petitioners argue that the instant case meets the criterion of the rule because the decision below has "left Alabama officers with no practical rule to guide them in the use of force" and has severely hampered "the State of Alabama's ability to protect the public." Pet. at 24. Accordingly, petitioners contend, it

is necessary that there be an immediate resolution by this Court of the constitutionality of the City of Montgomery's deadly force policy.

Contrary to petitioners' assertions, the district court's opinion provides a workable rule, not based on hindsight, to guide Alabama law enforcement officials in the use of deadly force. The district court's opinion makes clear that a police officer may use deadly force after making three determinations: first, that there is probable cause to believe that the suspect has committed a felony; second, that the use of deadly force is necessary to secure the suspect's arrest; and third, that the suspect is likely to physically harm the officer or another person if he is not immediately captured. The rule is clear and, like the common law rule, focuses on the officer's subjective state of mind at the time he makes the difficult

decision whether or not to shoot. If the officer has reason to believe that the use of deadly force is necessary to effect an arrest and that the fleeing suspect is dangerous, he is permitted to shoot. The officer is not liable if it later develops that the officer's reasonable belief was mistaken.[13] The rule does not permit a court or jury to second-guess the officer or to hold him liable as a result of "the use of hindsight in [an] after-the-fact review of the [officer's] decisions." Pet. at 20.

The rule does not, as petitioners imply, ask police officers to make determinations beyond their abilities. Under the common law, an officer must

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[13] For example, officer Kidd in this case mistakenly believed that respondent had committed a burglary. Respondent does not contend that Kidd's belief that a burglary was in progress was unreasonable.

already determine before shooting that a felony has occurred and that the use of deadly force is necessary. The district court's rule requires merely that the officer make an additional determination before he shoots, namely, that the suspect is likely to inflict injury if not immediately subdued. Like the first two assessments, this final determination is subjective, but it is one that law enforcement officers are uniquely qualified to make. Moreover, it is one that officers routinely make in the course of their work.[14] Model Penal Code §3.07

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[14] In fact, law enforcement officers rarely shoot a suspect whom they do not believe is dangerous, even when they are authorized by law or regulation to do so. This is true of officers in the Montgomery police department, as well as officers in other law enforcement agencies. Few officers wish to live with having killed a petty, often youthful, offender committing an offense for which he was unlikely to be imprisoned. Cf. A. Cohen, I've Killed That Man 10,000 Times, 3 Police 17 (1980).

Comments at 60 (Proposed Official Draft 1962). That the rule enunciated by the district court is workable is demonstrated by the fact that the rule, or some variation of it, is the law in approximately one-half of the states. Brief of Appellee-Respondent at 86, Tennessee v. Garner, Nos. 83-1035, 83-1070 (argued Oct. 30, 1984). In addition, most major law enforcement agencies in states that have not adopted the rule nonetheless restrict their officers' use of deadly force to situations in which such force is necessary to prevent death or serious bodily injury. See K. Matulia, A Balance of Forces: A Report of the International Association of Chiefs of Police (National Institute of Justice 1982). For example, the State of Alabama's three largest law enforcement forces -- the Alabama State Troopers, and the police departments of the cities of Birmingham and Mobile - by

regulation limit the use of deadly force to such situations. Alabama Dept. of Public Safety, Rules and Regulations, Order No. 4 (Jan. 1, 1981); Birmingham Police Dept., General Order 1-78 (July 7, 1980); Mobile Police Department, Procedural General Order #14-B (Sept. 6, 1982). Such regulations are motivated not only by a concern that officers spare the lives of petty criminals and innocent citizens, but also by a concern for the safety of their own officers. These agencies' statistics show that shootings and deaths of police officers decline when officers' use of deadly force is closely regulated. See, e.g., J. Fyfe, Administrative Interventions on Police Shooting Discretion: An Empirical Examination, 7 J.Crim.Just. 309 (1979).

Petitioners contend that the common law rule must be maintained because even

an unarmed suspect running from a police officer presents a danger to an officer and therefore the officer should be free to use deadly force to arrest him. Petitioners argue that an officer places his life in danger when he pursues and physically subdues a fleeing suspect. Whenever a physical confrontation develops, petitioners assert, a suspect may seize an officer's weapon and seriously injure him. Thus, an officer should be free to shoot even an unarmed fleeing suspect rather than give chase in order to avoid harm to himself.

Petitioners' argument reflects a disturbing misunderstanding of both the Alabama statute and the common law. According to petitioners, a police officer may shoot a fleeing suspect when the officer believes he can pursue and catch the suspect by nondeadly means. But that

is precisely what the common law forbids.[15] At common law a police officer may shoot a fleeing suspect only when he believes that pursuit and physical confrontation will not secure the suspect's arrest. Indeed, in Alabama an officer who shoots a suspect despite a reasonable belief that he could capture the suspect after pursuit would be subject not only to civil liability, Union Indemnity Co. v. Webster, 218 Ala. 468, 118 So. 794 (1928), but to criminal prosecution as well, Suell v. Derricott, 161 Ala. 259, 49 So. 895 (1909).[16]

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[15] Petitioners' rationale is also at odds with the common law for another reason. It would justify the shooting of fleeing misdemeanants who, after all, are just as capable of seizing an officer's weapon.

[16] Petitioners imply that Kidd did not pursue respondent because Kidd feared for his life should a physical confrontation ensue between Kidd and respondent. This version of the facts is flatly contradicted by Kidd's own testimony:

While it is true that officers may be harmed when trying to physically subdue resisting suspects, it is likewise true, as noted above, that in actual practice petitioners' fears do not come to pass; the rule enunciated by the district court in fact results in greater officer safety. Experience has shown that rules restricting deadly force encourage good police work, thus reducing the risk to police officers of serious injury or death. See, e.g., J. Fyfe, Administrative Interventions on Police Shooting Discretion: An Empirical Examination, 7 J. Crim.Just. 309 (1979). For example, if

> I ... made my decision once I initially ran those few steps and saw that I was not going to catch up with the subject. That's when I had to make the decision whether to fire or not to fire.

(K. 52-53).

the court's rule had been in effect in the instant case, Kidd might have chosen to radio the other police units present and converging on the scene in order to direct them to mass at respondent's anticipated exit point, where they could have captured him or continued to pursue him.[17] Kidd endangered himself by not involving other officers in respondent's arrest. He also endangered his fellow officers by shooting without knowing whether other officers were present in the area behind 614 W. Fairview Avenue. (R. 31-32, 50-51).[18] Broad discretion to use deadly force tends to encourage law enforcement officers to

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[17] The first rule of police work is to mass numbers of police officers at a crime scene when possible, both to protect one another and to display sufficient force to persuade the suspect to surrender without resistance.

[18] He also, of course, nearly took the life of an innocent 18-year-old man.

depart from sound police practice, thereby increasing the risk of injury to themselves, their fellow officers, bystanders, and arrestees.

B. Granting Certiorari in this Case will not Expedite the Resolution of the Constitutional Issue Raised by Petitioners.

Petitioners seek a writ of certiorari in order to expedite a judicial resolution of the constitutionality of Montgomery's deadly force policy. But the Court's issuing a writ will not in fact expedite the resolution of this issue. When this Court decides Garner, the court of appeals will apply that ruling to this case. If this Court decides that Tennessee's statute is unconstitutional, it will be plain that the City of Montgomery's deadly force policy is unconstitutional as well. And if this Court decides that it is permissible for police officers to use deadly force to arrest fleeing suspects

whom the police do not believe to be dangerous, it will be obvious that the City of Montgomery's policy is lawful. Permitting the case to follow normal appellate procedure will result in at least as swift a judicial determination as would review by this Court.[19]

Petitioners have never suggested that hearing this case would help the Court in considering Garner. And there is no reason to believe that it would have such an effect. What petitioners seek in essence is to intervene in the Garner litigation. Petitioners apparently neglected to request permission to file an amicus brief in Garner; they are now trying to file

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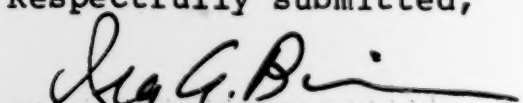
[19] If the court of appeals finds it is unnecessary to address the constitutional issue because nonconstitutional questions are dispositive, needless constitutional litigation will have been avoided. Yet, the State and Attorney General will have a resolution of the constitutional issue as a result of the Court's decision in Garner.

such a brief in the guise of a petition for review of the instant case before judgment below. The petition for a writ of certiorari before judgment in the court of appeals should be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the State of Alabama's and Attorney General Graddick's petition for a writ of certiorari before final judgment in the U.S. Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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NO. 84-715

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1984

STATE OF ALABAMA AND
CHARLES A. GRADDICK,
ATTORNEY GENERAL, PETITIONERS

VS.

DARRYL PRUITT, RESPONDENT

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT
(PRIOR TO FINAL JUDGMENT)

REPLY BRIEF AND ARGUMENT

OF

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AND

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

RESPONSE TO RESPONDENT'S STATEMENT OF THE FACTS

The Respondent's statement of the facts seems to suggest that it was unnecessary for Officer Kidd to shoot in order to effect the arrest of the Respondent, or, to put it another way, the Respondent suggests that Officer Kidd acted improperly under Section 13A-3-27, Code of Alabama, 1975. The Petitioners point out that, without in anywise conceding its validity, such a suggestion contradicts nothing in the Petition. The Petitioners are not here to defend Officer Kidd, the City of Montgomery, or anyone or anything, except the constitutionality of Section 13A-3-27, Code of Alabama, 1975.

SUMMARY OF THE REPLY ARGUMENT

1. The Respondent's argument on the significance of Tennessee v. Garner (No. 83-1035) and Memphis Police Department v. Garner (No.83-1070) to this case is contradicted by the position he takes in the Court of Appeals. See the Petition, Appendix "E". The Alabama statute has, through no fault of the People or officials of Alabama, been in constitutional limbo for nearly five years. This untenable situation will prevail until this Honorable Court acts authoritatively.

2. The Common Law Rule and the Alabama Statute balance the rights and protection of society, arrestees, and officers with a clear and practical rule. In striking down that Rule, the District Court established a confusing rule, which is primarily concerned with protecting

resisting arrestees. It is universally recognized that the resisted arrest situation creates a risk to life and limb; why should officers and society assume that risk rather than the felon who creates it? The District Court established a rule which creates doubt and confusion in life threatening situations. This Honorable Court ought to act now to establish a workable rule governing the use of deadly force in arrests.

REPLY ARGUMENT

I.

THE IMPACT OF GARNER ON THIS CASE

This Honorable Court clearly has jurisdiction to entertain the instant Petition. 28 U.S.C. 1254(1). The issue here is: Should the Court exercise its jurisdiction?

As pointed out in the Petition, this case meets all of the criteria for the granting of the writ prior to final judgment in the Court of Appeals. Petition, pages 21-27. However, the most important consideration in the Petitoners' opinion and apparently also that of the Respondent, is the pendency of Tennessee v. Garner (No. 83-1035) and Memphis Police Department v. Garner (No. 83-1070) in this Honorable Court. The Respondent argues that Garner is of little significance in this case. Yet, the Respondent took the exact opposite position in his motion to stay in the Court of Appeals. Appendix "E" to the Petition. The first sentence of each paragraph of Respondent's motion clearly demonstrates the importance of Garner to this case.

"1. The Garner litigation, pending in the U.S. Supreme Court, presents an issue which controls the disposition of this case...." (Appendix "E", p. 29; emphasis supplied).

"2. The decision of the district court challenged in the instant case rests on the same legal proposition at issue in Garner...." (Appendix "E", p. 30; emphasis supplied).

"3. Because the outcome of Garner will have a profound impact on the law that controls this case, plaintiff submits that it would be appropriate for this Court to stay the instant appeal until a decision is issued in Garner...." (Appendix "E", p. 32-33).

Having so argued in the Court of Appeals, how can the Respondent argue the opposite way in this Court? It seems that the Respondent's primary interest is in preventing the People of Alabama from defending their statute anywhere.

The Respondent asked the District Court to declare the Statute unconstitutional. The District Court did so and on

that basis and that basis alone, granted summary judgment for the Respondent against Officer Kidd and the City on the issue of liability. Now, the Respondent argues:

> "...'[F]ew propositions are better established than that constitutional adjudication should be avoided whenever possible.' Life Insurance Co. of North America v. Reichardt, 591 F.2d 499, 506 (9th Cir., 1979)...." (Respondent's Brief, p. 19).

This is good law, but it is a principle the Respondent should have embraced in the District Court. The Alabama statute should not have been declared unconstitutional, but it was at the insistance of the Respondent. Section 13A-3-27 Code of Alabama, 1975, has been in constitutional limbo since Ayler v. Hopper (532 F.Supp. 198 [m.D.Ala., 1981]) (See the Petition, pp. 4-7), and this has been through no fault of the People or Officers of the

State of Alabama. At the present time, Alabama officers have no clear law to guide them in the use of deadly force in making arrests, and this untenable situation will prevail until this Honorable Court either upholds the Statute or provides a clear and workable alternative.

II.

IT IS IMPERATIVE THAT THE CONFUSION CREATED BY THE DISTRICT COURT BE RESOLVED

The Respondent argues that a resolution of the constitutionality of Section 13A-3-27 is not imperative, since the District Court allegedly gave Alabama officers a workable alternative role. It is interesting to notice that in making this argument, the Respondent "cleans up" the District Court's Rule considerably. Respondent's Brief, p.34.

The Rule of the District Court in the instant case would allow the use of deadly force only "...to prevent imminent, or at least a substantial likelihood of death, or great bodily harm...." Ayler v. Hopper, 532 F.Supp. 198, 201 (M.D.Ala., 1981); Petition, Appendix "A", pages 6-7. What exactly is "a substantial likelihood of death or great bodily harm...."? An unarmed, youthful, 220 lb., six feet tall resisting arrestee could no doubt pose "...a substantial likelihood of death or great bodily harm..." to a diminutive or elderly police officer but would pose little such likelihood to his or her more burly colleague. Of course, the size, age and state of health, of a resisting arrestee is usually impossible to judge at the time. Would such a rule allow an officer to use deadly force to stop a

mass murderer or an escapee from death row, who presented no imminent danger to anyone? Maybe, but probably not.

The Respondent argues that the Rule established by the District Court does not call for hindsight review. This assertion is made in the face of the fact that the District Court applied its Rule and granted judgment for the Respondent on the basis of numerous facts (e.g. the Respondent's being unarmed; the fact that no burglary had occurred), which were unknown and unknowable to the officer when he acted.

If the Rule established by the District Court on June 12, 1984 (Petition, Appendix "A", pp. 1-11) was difficult to apply, it was made impossible by the amendment of July 26, 1984. (Petition, Appendix "A", pp. 12-13). This amendment concludes:

> "...Although Kidd testified that he initially feared an attack from Pruitt, his deposition testimony repeatedly indicates that Kidd's own subjective concern was for effecting Pruitt's arrest, and not for his own or another's safety...." (Appendix "A", page 13, emphasis supplied).

In the District Court's view, Kidd was unjustified in using deadly force, because his "heart was in the wrong place."

The District Court's Rule is utterly unworkable. As with all of the rules advanced in the place of the Common Law Rule, the justification for the use of deadly force is to an undefined degree subjective and is a function of numerous factors which would normally be impossible for the officer to judge at the time. The rules advanced in the place of the Common Law Rule are designed to guide courts in after-the-fact review

of officers' actions. They are entirely impractical in guiding officers at the time of the action.

The Common Law Rule, on the other hand, has for centuries provided officers with clear and easily applied guidance in resisted arrest situations. The Common Law Rule looks to objective factors, such as the legality of the arrest, the nature of the crime and the necessity of the force. In order to make a lawful arrest, an officer must have a warrant or probable cause to believe that the arrestee has committed some crime. Distinguishing between felonys and misdemeanors is a simple matter of familiarity with the criminal code. Determing the force necessary to effect an arrest is a simple matter of gradually escalating the force until the arrest is complete. Just as

officers can, under the Common Law Rule, know quickly and clearly what their duties and immunities are, so can an arrestee ascertain the risk he would be running should he choose to resist.

As stated in the Petition, the Common Law Rule always comes before the Courts in worst case senarios. It is, therefore, not surprising that the controversary over the Common Law Rule is grounded primarily on sympathy. The critics of the rule sympathize with resisting arrestees; their concern for society and police officers arises as almost as an afterthought. For example, these critics would bar an officer from using his or her firearm, unless the resisting arrestee is armed. Yet, in most of the situations where the problem arises, a muzzel-flash in the dark may be the first and perhaps the last, indica-

tion an officer has that a resisting arrestee is armed. The Common Law Rule, on the other hand, reflects balanced concern for society, the arrestee and the officer: Society is assured that if there is any way that the officer can effect a lawful felony arrest, he or she will do so. The arrestee can fully protect himself from both deadly and non-deadly force by obeying the law and submitting to lawful arrest. Finally, the Common Law Rule minimizes the risk run by an officer who must pursue an unknown lawbreaker, who may or may not be dangerous to the officer and who may or may not be armed.

The danger inherent in any resisted arrest situation is universally recognized. The District Court, in common with others who condemn the Common Law Rule, would allow the resisting

arrestee the first move toward deadly force. Given that the resisted arrest situation creates danger to life and limb, why should officers and society assume that risk, rather than the felons who unlawfully create it?

In this case the District Court struck down a ancient rule which for centuries has promoted safety, the law and justice. In the place of this sound and practical rule, the District Court created confusion and doubt in life threatening situations. This untenable state of affairs will continue until this Honorable Court acts. It is imperative that the Alabama statute be either upheld or replaced with a practical rule, and only this Court can do that authoritatively.

CONCLUSION

In conclusion, the Petitioners point out that this proceeding may as, a practical matter, be the only opportunity the People of Alabama have to defend their Statute. For this reason and those stated in their Petition, the Petitioners pray that this Honorable Court grant their petition.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

JOSEPH G. L. MARSTON III
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for Charles A. Graddick, Attorney General and the State of Alabama, Petitioners, do hereby certify that on this ___ day of December, 1984, I did serve the requisite number of copies of the foregoing on the Attorneys for all of the other parties in the Court of Appeals, by mailing the same to them first-class postage prepaid and addressed as follows:

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